

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

\*\*\*\*\*

UNITED STATES OF AMERICA, \* CR 20-50122-02

Plaintiff, \*

vs. \*

ORDER

KIMBERLEY PITAWANAKWAT, \*

Defendant. \*

\*

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The United States gave a Notice of Intent to Offer Prior Statements of George Dull Knife. The United States admits that Dull Knife is within their control as an inmate. Accordingly, Dull Knife is available for trial.

The United States apparently intends to offer Dull Knife's plea agreement and factual basis statement, together with his statements at his change of plea hearing and at his sentencing.

Evidence Rule 804(b) is one of the bases offered for admission of that evidence. The statements were statements against the interest of Dull Knife, not as to Defendant Pitawanakwat.

The other basis offered is Evidence Rule 807, the Residual Exception to the hearsay rule.

A question is whether or not the evidence is testimonial in nature. If it is, then the Confrontation Clause prevents the admission of the proposed evidence.. The Court notes it has seen the Presentence Report for Dull Knife but not the specific evidence the United States proposes to offer other than by description.

The evidence appears to be testimonial in nature. That, for example, would be true of the guilty plea and related statements and documents. See *United States v. Head*, 707 F.3d 1026 (8th Cir. 2013).

Considering possibilities, even if Dull Knife appears and contradicts the documents and statements referred to, then the impeachment of him with those documents and statements would only be impeachment and not substantive evidence.

If, on the other hand, Dull Knife appeared and refused to testify even though he would have

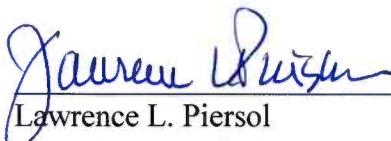
no Fifth Amendment basis to refuse to testify, then there would not even be any opportunity to impeach him.

No authority was filed by the United States to support its Notice of Intent. If there is authority to support that Notice of Intent, it must be filed by this Friday, October 6, 2023.

IT IS SO ORDERED.

Dated this 2<sup>nd</sup> day of October, 2023.

BY THE COURT:

  
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Lawrence L. Piersol  
United States District Judge

ATTEST:

MATTHEW W. THELEN, CLERK

  
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Matthew W. Thelen